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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1437

ARMSTRONG EQUIPMENT COMPANY, a corporation,

Petitioner,

vs.

CLARK EQUIPMENT COMPANY, a corporation; CLARK EQUIPMENT CREDIT CORPORATION, a corporation; and CLARK RENTAL CORPORATION, a corporation,

Respondents.

BRIEF

Of Respondents, Clark Equipment Company, et al in Opposition to Petition for Certiorari.

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Of Respondents, Clark Equipment Company, et al in Opposition to Petition for Certiorari.

The Respondent shall restate the question presented for review pursuant to Supreme Court Rule 40(3).

QUESTION PRESENTED FOR REVIEW

Was the District Court in a diversity action within its jurisdiction in granting a preliminary injunction requiring the debtor in default under a security agreement to assemble and deliver possession to the secured party of collateral consisting of construction equipment, parts and rental contracts upon finding: (a) that debtor was in default under the

security agreement for the sum of $224,069.86; (b) that debtor refused to deliver possession of the collateral to secured party upon demand; (c) that the collateral was located in the states of Alabama, Florida, Georgia, Mississippi and Tennessee; (d) that the total balance due under the security agreement by debtor to secured party was $1,806,403.53, plus interest; (e) and that debtor would continue to default under the security agreement thereby causing irreparable injury, loss and damage to secured party?

STATEMENT OF THE CASE

On June 19, 1969, respondent Clark Equipment Company, a Delaware corporation, and two of its subsidiaries, Clark Equipment Credit Corporation, a Michigan corporation, and Clark Rental Corporation, a Delaware corporation (collectively referred to as "Clark"), all of which have their principal place of business in Buchanan, Michigan, commenced this action against petitioner Armstrong Equipment Company ("Armstrong"), an Alabama corporation and Southern Scrap Material Company, Ltd. ("Southern Scrap"), a Louisiana corporation and the corporate parent of defendant Armstrong.

In its verified complaint, Clark averred defaults by Armstrong under a security agreement (A.53,54) which granted Clark a security interest in certain "products", "parts", and "collateral" which Armstrong had purchased from Clark, and further averred that Southern Scrap wholly managed Armstrong's affairs, was doing business in Alabama, and directly caused Armstrong's default under the security agreement. The defaults complained of were Armstrong's failure or refusal to remit proceeds from sales and rentals of construction equipment aggregating $224,069.86, as provided by the security agreement. Clark requested an injunction requiring Armstrong within a reasonable time

to assemble and to make available the collateral under the security agreement, consisting of construction equipment, parts, rental contracts, pursuant to Uniform Commercial Code, § 9-503 [Tit. 7A, § 9-503, Code of Alabama 1940 (Recomp. '58)] and allowing such collateral to be disposed of pursuant to Uniform Commercial Code, § 9-504 et seq. [Tit. 7A, § 9-504 et seq., Code of Alabama 1940 (Recomp. '58)] and ordering that the proceeds of such disposal be applied to the debt secured by the collateral. Further, the complaint prayed for a judgment for the deficiency, if any, after such disposal and application of the proceeds, against both Armstrong and Southern Scrap.

The initial hearing was held on June 27, 1969, whereupon the court issued a preliminary injunction which restrained Armstrong from further violating the security agreement by requiring that Armstrong either hold in trust or remit to Clark the proceeds realized from the sale or lease of collateral. A subsequent hearing was set for September 3, 1969.

At the hearing on September 3, 1969, Armstrong adduced evidence relative to its defenses to the complaint. On September 4, 1969, the court issued an order which required Armstrong to assemble and deliver possession of the collateral and to render an accounting of proceeds. Clark was permitted to dispose of the collateral in a "commercially reasonable manner" pursuant to Uniform Commercial Code, § 9-504 et seq., and was required to render an accounting to the court. Clark was further required to submit for approval by the court, its plan for disposal of the collateral.

Armstrong was allowed five days to file forthcoming bond to avoid the mandate of the order dated September 4, 1969, failing which, Clark was required to file bond in the amount of $1,000,000.00, with corporate surety, conditioned to pay any costs and damages incurred by any party found to be

wrongfully enjoined. Such order decreed that its issuance was not adjudicatory of any defense of Armstrong on the merits of the case.

On September 30, 1969, Armstrong filed notice of appeal from the orders entered by the District Court on September 4, pursuant to 28 U.S.C., § 1292 (a)(1). On September 1, 1970, the United States Court of Appeals for the Fifth Circuit affirmed the injunctive order of the District Court. On December 7, 1970 a petition for a rehearing en banc was summarily denied by the United States Court of Appeals for the Fifth Circuit.

ARGUMENT IN OPPOSITION TO REVIEW OF THIS CAUSE ON WRIT OF CERTIORARI

I.

Clark Had A State-Granted Substantive Right To Take Possession Of Collateral

The legislature of Alabama has provided a substantive right to a secured party to take possession of collateral from a debtor in default. Uniform Commercial Code § 9-503 [Tit. 7A, § 9-503, Code of Ala. 1940 (Recomp. '58)], provides:

> "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. **If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties.** Without removal, a secured party may render equipment unusable, and may dispose of collat-

eral on debtor's premises under § 9-504." (Emphasis supplied.)

Following this provision, paragraph 9 of the security agreement between Clark and Armstrong, entitled "REMEDIES" (A. 53,54), specifically provides that upon default, Clark may require Armstrong to assemble the collateral and make it available at a designated place which is reasonably convenient to all parties; and that Clark may exercise and shall have any and all rights and remedies accorded by the Uniform Commercial Code.

II.

Equitable Relief Was Envisioned By the Law of the State

The Uniform Commercial Code clearly invites specific enforcement of the substantive right to take possession of collateral from a debtor in default. For example, Uniform Commercial Code § 1-106(1) provides in part:

> "The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . ."

In W. Hogan, the Secured Party and Default Proceedings, in 1 COOGAN-HOGAN-VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE, § 803(1) (M. Bender ed. 1962), the author states:

> ". . . A new feature of the Code provisions is the statutory recognition of a provision in a security agreement requiring the debtor to assemble the collateral and make it available at a reasonably convenient place to be designated by the secured party. This feature is not expressly limited to any particular kind of collateral or

> to any particular type of transaction. However, it would appear from the fact that the section relates to taking possession of the collateral that it only deals with tangible kinds of collateral, such as goods, documents, instruments, and chattel paper. **Although Article 9 is silent on the question of the enforcement of this contractual right to require the debtor to assemble the collateral, § 1-106 clearly invites a court to grant specific relief. Money damages in this context are hardly sufficient to put the secured creditor who already has a money claim in as good a position as if the other party had fully performed."** (Emphasis supplied.)

Recognizing that the secured party has such a substantive right upon the debtor's default, the sole limitation upon the remedy available to the aggrieved party in a federal court in a diversity action is that the substantive right may not be enforced so as to lead to a "substantially different result" than would be achieved in the state court. **Guaranty Trust Company v. York,** 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945) Within such limitation, the federal court may fashion its procedure and remedies" . . . To secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ.P.1.

Although the decision by the Court of Appeals in this cause is rested upon traditional equitable grounds, it may be noted that recent decisions indicate that federal courts may in the future administer state-granted substantive rights without adhearing to the historic limitations on the availability of various remedies. For example, in **Beacon Theatres v. Westover,** 359 U.S. 500, 3 L.Ed. 2d 988, 79 S.Ct. 948(1959), Justice Black stated:

> "Inadequacy of remedy and irreparable harm are practical terms, however. As such their existence today must be determined, not by precedents decided

under discarded procedures, but in the light of the remedies made available by the Declaratory Judgment Act and the Federal Rules."

In 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1043, at 149 (1969) the authors comment that **Beacon** signals a broadening gamut of remedies available in a particular action, as follows:

"Merger has had yet another broadening effect on the remedies available in a particular action. Because courts now can give specific relief without being concerned about potential interference with another independent system of courts or the niceties of equity jurisdiction, there is a natural tendency either to grant specific relief or to couple specific relief with an award of damages more frequently than was true in older days. Eventually it may well be that courts will feel free to ask only: 'What remedy is best adapted to making the plaintiff whole?' This approach will enable judges to depart from the historic limitations on the availability of the various remedies."

The above view may be found in the language of Uniform Commercial Code § 1-106:

"The remedies provided by this title shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . ."

III.

No Substantial Right of Armstrong Has Been Affected

In Stern v. South Chester Tube Company, 390 U.S. 606, 20 L.Ed. 2d 177, 88 S.Ct. 1332 (1968), cited by the Court

of Appeals for the Fifth Circuit in the instant opinion, (A.23), Justice Black reversed a decision of the Court of Appeals for the Third Circuit in a case where a shareholder undoubtedly had a right, under the substantive law of the State, to inspect the records of a corporation in which he held stock. Even though the State provided a remedy by mandamus, Justice Black held that injunctive relief was available in the federal forum, as follows:

> ". . . [W]hat the [State] statute actually does is to authorize an action to compel [State] corporations to permit inspection of their records by their shareholders, and the label used under state practice of course has no bearing on the question whether the federal courts have power to grant the kind of relief actually sought. Consequently the District Court here does have power to issue the proper order to enforce petitioner's state-granted right to inspect the corporate records.
>
> The judgment of the Court of Appeals is reversed and the cause is remanded to that court for further proceedings consistent with this opinion."

The thrust of Armstrong's argument is that resort must be had to the State procedural remedy of detinue in order to enforce the substantive right created by the security agreement made pursuant to the Uniform Commercial Code. Following Stern, the label used under state practice of course has no bearing on the question whether the federal court has power to grant the kind of relief actually sought. The sole issue decided by the Fifth Circuit Court of Appeals was whether or not the District Court had power to grant the proper order to enforce Clark's state-granted substantive right to take possession of collateral, and Stern is compelling authority that it had such power.

IV.

Clark Was Entitled to Equitable Relief On Traditional Grounds

In addition, Clark was entitled to equitable relief in this action on the traditional equitable grounds that irreparable injury was threatened and that the remedy at law was inadequate. The District Court's finding of fact and conclusions of law made June 27, 1969 specifically state that irreparable harm was threatened and that Clark had the right to possession of the collateral. (A.30) The Court of Appeals also rested its decision on the inadequacy of the remedy at law. The Court stated:

> "In this case, where the equipment was in five states, no one possessory action would provide an adequate remedy."
>
> * * *
>
> "The injunctive relief granted was not only within the court's jurisdiction but was, we think, the only appropriate remedy for the enforcement of the terms of the agreement in view of the location of the property in five different states."

The alternative to such injunctive relief would have been the filing of forty possessory actions in five states requiring United States Marshals and County Sheriffs to take possession and move equipment weighing from five to sixty tons each.

The Uniform Commercial Code was enacted to eliminate this type of travesty. It provides that ". . . [A] secured party has on default the right to take possession of the collateral . . . and . . . if the security agreement so provides, the secured party may require the debtor to assemble the collateral and

make it available to the secured party . . .". Uniform Commercial Code, § 9-503. Its remedies are to ". . . be liberally administered . . . to the end that the aggrieved party may be put in as good a position as **if the other party had fully performed** . . ." by actions including ". . . suits in equity." Uniform Commercial Code, §§ 1-106,1-201.

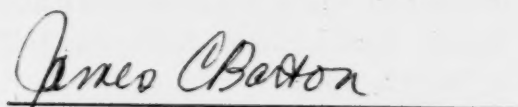
(Emphasis Supplied.)

The District Court simply enforced the security agreement between the parties following the clear and simple mandates of the Uniform Commercial Code and simultaneously protected Armstrong by: (1) delaying its possessory order from June 27, 1969, to September 4, 1969; (2) giving Armstrong the right to retain possession by posting bond on or before September 9, 1969; (3) requiring Clark to post bond in the amount of $1,000,000.00 conditioned to pay Armstrong's cost and damages for detention; (4) requiring Clark to file for approval its plan of sale and disposition; (5) requiring Clark to report and account to the court its sale and disposition and (6) ordering that the decree was not "adjudicatory of and shall be without prejudice to any defense or defenses that the defendant may have upon final hearing . . ." after (7) hearing extensive testimony.

CONCLUSION

A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. In the absence of such showing by the Petitioner in this cause, the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit is due to be denied.

Respectfully submitted



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PROOF OF SERVICE

I, James C. Barton, a member of the Bar of this Court, and of counsel for Respondents herein, hereby certify that I have served four copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on the Petitioner herein, Armstrong Equipment Company, a corporation, by mailing four copies of the same to the Honorable Morris K. Sirote, counsel for Petitioner, by depositing same in a United States mail box, with first class postage prepaid, addressed to him at his post office address at 2030 1st Avenue North, Birmingham, Alabama, 35203 on this the 31 day of March, 1971.

James C. Barton

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